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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOSE LUIS SERNA et al., Defendants and Appellants.	B202394 (Los Angeles County Super. Ct. No. KA076701)

APPEAL from judgments of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed as modified.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant Jose Luis Serna.

Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant Jose J. Martinez.

Edmund G. Brown Jr., Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Sarah J. Farhat and David A. Voet, Deputy Attorneys General for Defendants and Respondents

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A jury found Jose Luis Serna and Jose Jesus Martinez guilty of first degree murder in the shooting death of Aureliano Reyes, Jr. On appeal Serna and Martinez contend the court erred in refusing their requests to instruct the jury on justifiable homicide and voluntary manslaughter based on imperfect self-defense. They also contend the evidence was insufficient to support the jury's gang-enhancement findings. We modify the judgments of conviction to correct certain sentencing errors and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

Serna and Martinez were both charged by information with one count of murder (Pen. Code, § 187, subd. (a)).[1] In addition, the information specially alleged Serna had personally and intentionally discharged a firearm proximately causing death (§ 12022.53, subds. (b), (c) & (d)) and had suffered a prior serious or violent felony conviction within the meaning of the "Three Strikes" law (§§ 667 subds. (b)-(i), 1170.12, subds. (a)-(d)) and section 667, subdivision (a)(1). The information specially alleged Martinez had personally used and intentionally discharged a firearm (§ 12022.53, subds. (b) & (c)). As to both Serna and Martinez, the information specially alleged a principal had personally used and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (b), (c), (d) & (e)(1)) and the murder was committed for the benefit of, at the direction of or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members (§ 186.22, subd (b)(1)(C)).

2. *The Trial*

Serna and Martinez were tried together before a jury. According to the evidence presented at trial, on October 7, 2006 Reyes and his friends Carlos Gandara and Abel Romero, none of whom was a gang member, attended a party across the street from Reyes's home in the city of El Monte. As they arrived at the party, Martinez and a group of six other men blocked their entrance. Martinez announced he and the men with him

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[1] Statutory references are to the Penal Code unless otherwise indicated.

were "East Side Duarte" and demanded to know where Reyes and his friends were from, a question Gandara and Romero understood as inquiring about their gang affiliation. Gandara and Romero replied they were not "from anywhere," meaning they were not involved with a criminal street gang, and brushed past the men to go into the party. Feeling uncomfortable about the confrontation, however, Reyes and his friends soon left the party to join their friend Jerry Mata at Mata's house across the street.

While Gandara, Romero, Reyes and Mata were socializing and drinking beer on Mata's porch, they saw the men who had earlier identified themselves as "East Side Duarte" leave the party. One of the men, staring at the group on Mata's porch, asked in a confrontational manner if they "had a problem." Reyes responded, "Why, what's up?" Serna and Martinez immediately broke away from their group and ran up the driveway to Mata's house. As Serna and Martinez approached, Reyes took two steps forward (according to Mata) or backward (according to Gandara and Romero) and then stood his ground in preparation for a fist-fight. As Serna and Martinez ran toward Reyes, Martinez reached for a gun in his pocket. Serna was quicker, drawing his own firearm and firing multiple shots at Reyes, who was standing three feet away. Reyes died from multiple gunshot wounds to the chest.

Investigators found brass knuckles on the ground near Reyes's head. Romero and Gandara testified Reyes had shown them brass knuckles earlier in the evening, but they did not see them in his hand at the time of the shooting. Toxicology tests revealed Reyes had alcohol and methamphetamine in his system at the time of his death.

Neither Serna nor Martinez testified.

3. *Jury Instructions*

On the last day of trial defense counsel requested the trial court to instruct the jury with Judicial Council of California Criminal Jury Instructions (CALCRIM) Nos. 505 (justifiable homicide: self-defense or defense of another) and 571 (voluntary manslaughter: imperfect self-defense). Asked what evidence supported giving those instructions, Serna's counsel advised the court the final witness, Robert Royce, a defense investigator, would testify later that day that Mata had told him Reyes had been holding

the brass knuckles in his hand and had assumed a "fighter stance" at the time he was shot. The court refused to give either instruction, concluding, even with Royce's proffered testimony, there was no evidence to support either a self-defense or an imperfect self-defense instruction.[2]

4. *The Verdict and Sentences*

The jury found Serna and Martinez guilty of first degree murder and also found true each of the firearm-use and gang-enhancement allegations. After Serna waived his right to a jury trial on his prior conviction allegations, the court found each of the prior conviction allegations true. Serna was sentenced to an aggregate state prison term of 80 years to life. Martinez was sentenced to an aggregate state prison term of 50 years to life.[3]

DISCUSSION

1. *The Trial Court Did Not Err in Refusing Serna's and Martinez's Requests To Instruct on Self-defense and Voluntary Manslaughter Based on Imperfect Self-defense*

a. *Standard of review*

A trial court in a criminal case has a duty to instruct on general principles of law applicable to the case (*People v. Blair* (2005) 36 Cal.4th 686, 745), that is, """"those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."""" (*People v. Valdez* (2004) 32 Cal.4th 73, 115.) This obligation includes the duty to instruct on a lesser included offense if the evidence raises a question as to whether the elements of the lesser-included

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[2] After the court's ruling on jury instructions, Royce testified that, during an interview with Mata several months after the shooting, he had asked Mata to identify which hand Reyes had been holding brass knuckles. Mata replied, "His right hand, I think."

[3] Although the jury found the gang-enhancement allegations true, the court struck those enhancements for both Serna and Martinez, explaining the enhancement's 15-year minimum parole eligibility requirement (§ 186.22, subd. (b)(5)) would have "no effect" in light of Serna's 80-years-to-life sentence and Martinez's 50-years-to-life sentences.

offense are present. (*Valdez*, at p. 115; *People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) Likewise, a trial court must instruct on an asserted defense, including self-defense, if there is sufficient evidence from which a reasonable juror could find the defense applicable. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1046; *Breverman*, at p. 154.)

When the trial court refuses a proposed instruction for lack of evidence, we review the record de novo to determine whether the record contains substantial evidence to warrant the instruction. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581, 584; *People v. Cruz* (2008) 44 Cal.4th 636, 664.) In this context, "substantial evidence" means "'evidence from which a jury composed of reasonable [persons] could . . . conclude[]'" that the particular facts underlying the instruction did exist. (*Cruz*, at p. 664; see also *People v. Wilson* (2008) 43 Cal.4th 1, 16 ["[t]here was no substantial evidence, that is, evidence that a reasonable jury would find persuasive," to warrant lesser-included offense instruction].)

b. *Governing law*

Homicide is justified when committed in self-defense, that is, when the defendant actually and reasonably believes in the need to defend against imminent bodily injury or death. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1081; *Breverman, supra,* 19 Cal.4th at p. 154; see also § 197 [homicide justified when killing is accomplished in defense of self or others]; § 198 [circumstances excusing homicide must be "sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone"].) A jury must consider what "'would appear to be necessary to a reasonable person in a similar situation and with similar knowledge . . . .'" (*Humphrey,* at p. 1083.)

If the defendant acts under the subjective but objectively unreasonable belief he or she is in imminent danger of great bodily injury or death, the killing is considered accomplished in "imperfect self-defense," that is, the defendant is "'is deemed to have acted without malice and cannot be convicted of murder,'" but can be convicted of the lesser-included offense of voluntary manslaughter. (*People v. Humphrey, supra,* 13

Cal.4th at p. 1082; see also *People v. Randle* (2005) 35 Cal.4th 987, 994 ["[i]mperfect self-defense mitigates, rather than justifies, homicide; it does so by negating the element of malice"]; *People v. Wilson*, *supra*, 43 Cal.4th at p. 16.)

c. *There was no substantial evidence to warrant either a self-defense or imperfect self-defense instruction*

Serna and Martinez contend the trial court erred in refusing their request to instruct the jury on justifiable homicide (self-defense) and voluntary manslaughter based on imperfect self-defense. Citing evidence Reyes had had brass knuckles in his hand and had assumed a "fighter stance" when Serna and Martinez approached him, they urge a properly instructed jury could have reasonably concluded Serna and Martinez at least subjectively (even if not reasonably) believed they needed to use deadly force to protect themselves.

The trial court properly refused both instructions because the evidence was too insubstantial to support either defense theory. (See *People v. Strozier* (1993) 20 Cal.App.4th 55, 63 ["a jury instruction need not be given whenever *any* evidence is presented, no matter how weak"; court has no obligation to instruct on theories "the jury could not reasonably find to exist"]; see also *People v. Marshall* (1997) 15 Cal.4th 1, 40 [jury instructions based on "'unsupported theories should not be presented to the jury'"].) At trial, it was undisputed that Serna and Martinez were the aggressors. They initiated contact with Reyes, charging at him and his friends from across the street while Reyes remained on Mata's driveway. Upon approaching Reyes, who had assumed a "fighter stance" indicative of someone intent on defending himself, Serna immediately pulled a firearm and shot him. No words were exchanged. Although Reyes had been in possession of brass knuckles, which were found next to his body at the scene, and may have even been holding them in his hand at the time he was shot, that evidence was not sufficient to suggest Serna or Martinez were threatened in any manner, let alone feared for their lives. As the trial court observed, "the effective use of brass knuckles is that you have to be within swinging distance, and the only people closing that distance was not the victim. It was the defendants."

Serna and Martinez insist evidence Reyes had been holding brass knuckles in his hand, coupled with the fact the shooting took place at night, at least permitted the inference that Serna and Martinez had mistaken the brass knuckles for some other weapon such as a knife or a gun and believed (reasonably, in the case of self-defense, or unreasonably, in the case of voluntary manslaughter based on imperfect self-defense) they needed to resort to deadly force to protect themselves. Other than the fact that it was night, there was no evidence to support such an inference, as creative as it may be. There was no testimony concerning the absence of street lights or other illumination that suggested Serna's or Martinez's vision was completely obscured. To the contrary, the testimony the gang members saw Reyes's group on the porch across the street from the party plainly suggests the individuals involved in the incident could see each other. Indeed, Gandara's testimony that it was not so "dark to where you can't see the person" was uncontradicted. Moreover, there was no evidence that Reyes reached into his clothing to retrieve something that could have been a weapon, nor is there any evidence to suggest that Serna or Martinez -- or any of the witnesses -- actually (whether or not reasonably) mistook brass knuckles for some other weapon. (See *People v. Oropeza* (2007) 151 Cal.App.4th 73, 82 ["'The subjective elements of self-defense and imperfect self-defense are identical. Under each theory, the appellant must actually believe in the need to defend himself against imminent peril to life or great bodily injury. To require instruction on either theory, there must be evidence from which the jury could find that appellant actually had such a belief.'"].) Rather, the state of the evidence was that Serna and Martinez had charged Reyes immediately after he responded to their challenge and shot him**.** In sum, there was no substantial evidence to warrant either a self-defense or imperfect self-defense instruction. (See *ibid*. [when defendant did not testify and there was no other evidence to show he subjectively believed deadly force was necessary to protect his life, court did not err in refusing to instruct jury on self-defense or voluntary manslaughter based on imperfect self-defense]; cf. *People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1263 [when witnesses testified someone shot at defendant first,

evidence was sufficiently substantial to warrant self-defense and imperfect self-defense instruction].)

d. *Any error in failing to give the requested instructions was harmless*

Even if there were error in failing to give a self-defense or imperfect self-defense instruction, the error was plainly harmless. (See *Breverman, supra,* 19 Cal.4th at p. 165 [failure to instruct on lesser included offense is an error of California law alone, and thus subject only to state standards of reversibility; that is, failure to so instruct "is not subject to reversal unless an examination of the entire records establishes a reasonable probability that the error affected the outcome"]; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The defense theory of the case was that neither Serna nor Martinez was involved in Reyes's shooting and had been mistakenly identified by witnesses during suggestive photographic line-ups. Alternatively, they argued, if the jury found they had been involved, it should find that Serna and Martinez had mistaken the brass knuckles in Reyes's hand for a knife or a gun; on this latter point, the defense specifically asked the jury to consider the court's provocation instruction (CALCRIM No. 522), directing the jury to find the defendants guilty of second degree murder, not first degree murder, if it found there was sufficient provocation.[4] By finding Serna and Martinez guilty of first degree murder, the jury necessarily rejected that proposed inference. (See, e.g., *People v. Lewis* (2001) 25 Cal.4th 610, 646 ["[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions"].)

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[4] CALCRIM No. 522 provides, "Provocation may reduce a murder from first degree to second degree. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder."

2. *The Jury's Gang-enhancement Findings Are Supported by Substantial Evidence*[5]

a. *Governing law*

To obtain a true finding on an allegation of a criminal street gang enhancement, the People must prove the crimes at issue were "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1).) To prove a gang is a "criminal street gang," the prosecution must

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[5] At the threshold, the People urge the issue is moot because the trial court struck the gang enhancement as to both Serna and Martinez, reasoning the 15-year minimum parole eligibility requirement (§ 186.22, subd. (b)(5)) would have no practical effect in light of Serna's and Martinez's 80-years-to-life and 50-years-to-life sentences. In fact, the court's reason for striking the enhancements, as opposed to staying imposition of the minimum parole eligibility requirement -- because it was subsumed in the sentences -- appears to be improper. (See § 186.22, subd. (g) [court may strike gang enhancement *only* "in an unusual case where the interests of justice would best be served"].)

Moreover, even if striking of the enhancement were proper, the challenge to the sufficiency of the evidence to support the jury's true finding on the gang enhancement is not moot. Martinez's consecutive 25-years-to-life sentence for the firearm enhancement under section 12022.53, subdivisions (d) and (e)(1), rests on a finding a principal violated section 186.22, subdivision (b). (See § 12022.53, subd. (e)(1) ["The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22; [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)."].) If the jury's findings on the gang enhancement were inadequate, Martinez's sentence would be improper.

In addition, even if the gang findings had no impact on the sentences, we would still reach the issue. Common experience teaches that the People may wish at some later point to invoke the historical fact of the jury's true finding on the gang enhancement, making resolution of the adequacy of that finding appropriate in this appeal. (See *People v. Shirley* (1993) 18 Cal.App.4th 40, 47 ["[t]he striking of the enhancement for sentencing purposes in the earlier case does not negate the conviction or enhancement nor change the nature of the original offense and its accompanying enhancement"]; see generally *In re Varnell* (2003) 30 Cal.4th 1132, 1137-1138 [trial court's decision to strike prior conviction does not "wipe out" the fact of the prior conviction or its effect in connection with future prosecutions].)

demonstrate it has as one of its "primary activities" the commission of one or more of the crimes enumerated in section 186.22, subdivision (e), and it has engaged in a "pattern of criminal gang activity" by committing two or more such "predicate offenses." (§ 186.22, subds. (e), (f);[6] see *People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*).)

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations," as opposed to the occasional commission of those crimes by one or more of the group's members. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323-324.) "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute." (*Id.* at p. 324.) This is most often accomplished through expert testimony. (*Ibid.; Gardeley, supra,* 14 Cal.4th at p. 618 [expert testimony by police detective particularly appropriate in gang enhancement case to assist fact finder in understanding gang behavior]; *People v. Gonzalez* (2006) 38 Cal.4th 932, 944-946.)

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[6] Section 186.22, subdivision (f), defines the term "criminal street gang" as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more" criminal acts enumerated in subdivision (e) of the statute and which has "a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." Subdivision (e) of section 186.22 defines the phrase "pattern of criminal gang activity" as "the commission of, attempted commission of, conspiracy to commit, or solicitation of sustained juvenile petition for, or conviction of two or more" of the offenses enumerated in that subdivision "provided at least one of these offenses occurred after the effective date of this chapter [September 26, 1988,] and the last of those offenses occurred within three years after a prior offense, and the offenses are committed on separate occasions, or by two or more persons."

b. *There was substantial evidence the East Side Duarte gang had as one of its "primary activities" the commission of crimes enumerated in section 186.22*

Deputy Sheriff Brant Frederickson, a gang investigator for the city of Duarte and 11-year veteran of the Los Angeles County Sheriff's Department, testified as the People's gang expert. Frederickson explained he had extensive training in gang culture and gang activity and testified he had had regular and extensive contact with East Side Duarte gang members during the 11 months preceding his testimony. Frederickson opined the shooting was intended to benefit the East Side Duarte gang. Frederickson acknowledged he was unaware of any rivalry between the East Side Duarte gang and a gang in El Monte. Nonetheless, he explained, when gang members feel their gang and its members are being disrespected by anyone, whether or not a member of a rival gang, they may shoot someone simply for the sake of protecting their reputation and supporting their fellow gang members. In response to questions concerning East Side Duarte's "primary activities," Frederickson testified the gang was "very active" in committing violent crimes, including "drive-by" and "walk-up" shootings.

Serna and Martinez contend Deputy Frederickson's testimony was insufficient to support the jury's gang findings.[7] In particular, they assert Frederickson's testimony the

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[7] In reviewing a claim of insufficient evidence in a criminal case, we determine whether, on the entire record viewed in the light most favorable to the People, any rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; see also *People v. Holt* (1997) 15 Cal.4th 619, 667.) "In making this assessment the court looks to the whole record, not just the evidence favorable to the [defendant] to determine if the evidence supporting the verdict is substantial in light of other facts." (*Holt*, at p. 667.) "Substantial evidence" in this context means "evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord *People v. Hill* (1998) 17 Cal.4th 800, 848-849 [""[w]hen the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence -- i.e., evidence that is credible and of solid value -- from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt""].) "Although the jury is required to acquit a criminal defendant if it finds the evidence susceptible of two reasonable interpretations, one of

East Side Duarte gang was "very active" in various shootings, including "walk-up" shootings and "drive-by shootings" -- crimes enumerated in section 186.22, subdivision (e)(1), (e)(6) -- is qualitatively different from testimony that those acts constituted the gang's "primary activities." Their argument, resting on an asserted distinction between the term "primary" and the term "very active," is wholly unpersuasive. Frederickson's testimony did not occur in a vaccum. Rather, it was offered and understood in response to the prosecutor's request to enumerate the gang's primary activities. Although Frederickson did not repeat the term "primary activities" as used in the question posed to him, it was clear his use of the term "very active" in response to that question was intended, and reasonably understood, to mean activity that is "consistent" and "repetitive," rather than occasional. (See *People v. Sengpadychith, supra,* 26 Cal.4th at pp. 323-324.) As we explained in *People v. Margarejo* (2008) 162 Cal.App.4th 102, 107 to 108 in rejecting a similar argument a gang expert's testimony concerning the gang's activities was insubstantial because he failed to use the word "primary," "Ordinary human communication often is flowing and contextual. Jurors know this. Repetitive and stilted responses make up one kind of direct examination, but not the only kind. Margarejo's objection here calls for an unreasonably restrictive interpretation of [the officer's] answer, which we respectfully decline."[8]

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which favors guilt and the other innocence, it is the jury, not the appellate court, which must be convinced of his guilt beyond a reasonable doubt." (*People v. Millwee* (1998) 18 Cal.4th 96, 132.)

[8] Serna and Martinez also suggest Deputy Frederickson's testimony is insubstantial because it lacked foundation. (See *In re Alexander L.* (2007) 149 Cal.App.4th 605, 612-613.) However, unlike in *In re Alexander L.,* the defense never objected to Frederickson's testimony on foundation grounds. (See *id.* at p. 612, fn. 4 [court improperly overruled defense counsel's objection on foundation grounds].) Accordingly, we do not consider that contention on appeal. (See Evid. Code, § 353; see also *People v. Seijas* (2005) 36 Cal.4th 291, 302 ["[i]n accordance with [Evid. Code, § 353], we have consistently held that the 'defendant's failure to make a timely and specific objection' on the ground asserted on appeal makes that ground not cognizable"].)

d. *There was substantial evidence of a pattern of criminal gang activity*

A "pattern of criminal gang activity" is defined as gang members' individual or collective "commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" enumerated predicate offenses during a statutorily defined time period. (§ 186.22, subd. (e); see also *Gardeley, supra,* 14 Cal.4th at p. 617; see also fn. 6 above.) The predicate offenses must have been committed on separate occasions or by two or more persons. (§ 186.22, subd. (e); *People v. Loeun* (1997) 17 Cal.4th 1, 9-10.) The charged crime may serve as a predicate offense. (*Gardeley,* at p. 625.)

Here, the gang's pattern of criminal gang activity was established by evidence that East Side Duarte gang member Jesse Hurtado had suffered a prior conviction for attempted murder in 2005 and another East Side Duarte gang member, Jose De Jesus Gordo, had been convicted of driving a vehicle without the owner's consent in April 2006, both predicate offenses enumerated in section 186.22, subdivision (e). Minute orders were introduced into evidence to establish the prior convictions, and Deputy Frederickson testified (over a hearsay objection) that it was his opinion, after speaking with his fellow deputies who "work gangs," that both men had been members of the East Side Duarte gang at the time they were convicted.

Serna and Martinez contend Deputy Frederickson's testimony is insubstantial because it relies on hearsay (Frederickson's conversations with his fellow deputy sheriffs) to establish Hurtado's and Gordo's membership in the East Side Duarte gang. The argument is not well taken. Deputy Frederickson testified as an expert witness. It is well established that an expert may rely on hearsay in developing his or her opinion (*Gardeley, supra,* 14 Cal.4th at p. 618), including an opinion about gang membership. (See, e.g., *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210 [not improper for expert to rely on his out-of-court conversations with gang members in testifying defendant was affiliated with criminal street gang]; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1463-1464 ["an individual's membership in a criminal street gang is a proper subject for expert testimony"; expert may rely upon his or her "conversations with gang members, his or

her personal investigations of gang-related crimes, and information obtained from colleagues and other law enforcement agencies" in developing his or her expert opinion]; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506; see also *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1442 [gang expert may rely on hearsay; hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford*[9] condemned].)[10]

3. *Martinez Is Entitled to Four Additional Days of Presentence Custody Credit*

A defendant convicted of murder is entitled to presentence custody credit for the actual number of days in confinement up to the date of sentencing but may not receive worktime or conduct credits. (§§ 2900.5, subd. (a); 2933.2; *People v. Taylor* (2004) 119 Cal.App.4th 628, 645-647.) Martinez, who was in custody from the date of his arrest, contends he is entitled to four additional days of actual custody credits because the trial court's calculation of 308 days of presentence custody credit was based on his attorney's assertion of an improper arrest date -- November 10, 2006 -- rather than November 6, 2006, the date that appears in his probation report.

The appellate court may correct a miscalculation in presentence conduct credits in the first instance when the facts are undisputed in order to advance judicial economy. (See, e.g., *People v. Jones* (2000) 82 Cal.App.4th 485, 493; *People v. Acosta* (1996) 48 Cal.App.4th 411, 427-428; cf. *People v. Guillen* (1994) 25 Cal.App.4th 756, 764 [when question presented concerning presentence custody credits is not a matter of simple arithmetic but involves a fact determination, claim of error in calculation of presentence

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[9] *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177].)

[10] Although not expressed directly, Serna and Martinez's objection to the testimony again appears to be primarily one of lack of foundation, that is, foundational facts such as the identities of Deputy Frederickson's fellow deputies and the context of the conversations were not established. Because there was no objection on foundation grounds in the trial court, however, that issue is forfeited. (See fn. 8, above and citations therein; see also *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1207-1208 [defense counsel's general objection to entirety of gang expert testimony insufficient to preserve objection to expert opinion on issue of defendant's intent to benefit gang].)

custody credits should be directed to trial court in first instance].) Although the People correctly observe that Martinez's own counsel had represented the arrest date as November 10, 2006, they advance no material factual dispute undermining Martinez's assertion his lawyer (likely relying on the date of the month Serna was arrested)[11] was mistaken and that the actual arrest date is correctly stated in his probation report. Accordingly, we modify the calculation of presentence custody credits to correspond to the arrest date listed on Martinez's probation report.

4. *The Trial Court Should Have Imposed and Stayed the Lesser Firearm-use Enhancements*

At sentencing the court imposed the firearm-use enhancements under section 12022.53, subdivision (d), as to both Serna and Martinez, but did not impose (or formally strike) the lesser enhancements the jury had also found true (§ 12022.53, subds. (b) &(c)) nor do those enhancements appear in the abstract of judgment. Serna and Martinez insist we must formally strike the lesser firearm-use enhancements.

Section 12022.53, subdivision (f), provides that "[o]nly one additional term of imprisonment under this section shall be imposed per person for each crime" and requires the trial court to impose the enhancement "that provides the longest term of imprisonment." The Supreme Court recently held the trial court may not strike the lesser firearm-use enhancements, but must impose and then stay those enhancements the jury found true. (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1129-1130 [when jury finds multiple firearm-use enhancements under § 12022.53 true, trial court shall impose the firearm enhancement with the longest term of imprisonment in accordance with § 12022.53, subd. (f), and impose and stay the lesser firearm-use enhancements].) Accordingly, we modify the judgment to impose and stay the firearm-use enhancements found true under section 12022.53, subdivisions (b) and (c). (*Gonzalez,* at p. 1130.)

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[11] Serna was arrested on October 10, 2006.

DISPOSITION

The judgments of conviction are modified to impose and stay the firearm-use enhancements found true under section 12022.53, subdivisions (b) & (c). The judgment of conviction of Martinez is also modified to award 312 days, rather than 308 days, of presentence custody credit. As modified, the judgments are affirmed. The abstracts of judgment are ordered corrected to reflect these changes. The superior court is directed to prepare corrected abstracts of judgment and to forward them to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.